

**BEREC Guidelines on the application of Article 3 of
the Roaming Regulation -
*WHOLESALE ROAMING ACCESS***

-
A Consultation

June 2012

1. INTRODUCTION

According to Article 3 of the Regulation, mobile network operators (MNOs) must meet all reasonable requests for wholesale roaming access, comprising direct wholesale roaming access and wholesale roaming resale access. Direct access means that the access seeker contracts directly with a foreign visited network for the purpose of allowing roaming customers to access the roaming services of the retail provider. Resale access means that the retail provider bases its retail service on the wholesale service provided by an MNO usually, but not necessarily, in the end user's home country.

While Article 3 is drafted in general terms, it is expected that most direct access agreements will be broadly in line with the classical wholesale roaming agreements negotiated between MNOs. The existing access agreements between MNOs, on the one hand, and MVNOs/resellers, on the other hand, are (to the extent that they deal with roaming) resale agreements. However, requests for other variants of direct or resale access must be met, provided only that they are reasonable.

This document discusses the guidance which BEREC is required under the Regulation to publish relating to the operation of Article 3 in practice. The annexed draft Guidelines describe the main obligations for MNOs (and corresponding rights of access seekers) concerning the provision of roaming access services. The guidance is not legally binding. Nevertheless, NRAs are required to take the utmost account of it in resolving any disputes or taking any enforcement action concerning Article 3. In particular, where NRAs make a decision which departs from this guidance, they will be expected to state objective reasons for the departure.

The Guidelines apply to "regulated" roaming services, as defined in the Regulation. Except where the Regulation explicitly applies to other services, it means services where the customer is roaming within the EEA¹².

BEREC expects that these Guidelines will be a living document and will be updated from time to time in the light of experience.

BEREC is required to issue Guidelines by 1 October 2012 in order to promote consistent application of the provisions of Article 3 of the Roaming Regulation. Comments are welcome from all stakeholders and interested parties not later than August 10. A public hearing is planned for July 19 in order to assist stakeholders to focus their responses.

BEREC believes that, for the most part, the draft Guidelines are self-explanatory and require no special justification. This consultation document therefore concentrates on issues where the best approach is not obvious and requires justification.

¹ Until such time as Iceland, Liechtenstein and Norway have incorporated the Regulation into national law, obligations described by these Guidelines do not apply to MNOs based in those states.

² A 'roaming customer' is "a customer of a roaming provider of regulated roaming services, by means of a terrestrial public mobile communications network situated in the Union, whose contract or arrangement with his roaming provider permits Union-wide roaming

2. PROVISION OF SERVICE (Guideline 1)

Some stakeholders have suggested informally that access obligations under Article 3 do not come into effect until 1 January 2013. The significance of this date is that MNOs must, not later than Jan 1 2013, publish a Reference Offer, based on BEREC Guidelines, which sets out the basis on which they are prepared to offer wholesale roaming access services.

BEREC believes that this would be an incorrect interpretation of the Regulation. Article 3, which governs wholesale roaming access, is not (for the most part) explicitly time-limited. The main provisions (in particular, the obligation to meet all reasonable requests for access) therefore apply from the day on which the Regulation comes into effect. The additional requirements relating to the Reference Offer apply from 1 January 2013. This does not excuse MNOs from compliance with the basic obligation, even though BEREC Guidelines are not due to be published until 1 October 2012.

Q1. Do you agree with BEREC's interpretation of the Regulation concerning timing of provision of service?

3. REQUIREMENT TO SUPPLY SERVICES; BASIS OF PRICING (Guidelines 2, 12)

Article 3.2 provides that, in the case of resale, all services and facilities necessary to permit the reseller to provide a retail roaming service must be provided. Article 3.3 states that the price charged for this bundle of services must not exceed the wholesale price caps set out in Articles 7, 9 and 12 of the Regulation. Moreover other services (which do not satisfy the above test) may be provided at fair and reasonable prices.

These provisions require careful interpretation, taking full account of the objectives of the co-legislators, in order to reach an appropriate outcome.

One possible interpretation is that any service reasonably required by a reseller is deemed to be within the bundle covered by the price caps. This would include, in particular, services which are the responsibility of the retailer, some of which can in most cases realistically be provided only by the network operator acting as agent of the reseller. BEREC considers that this would place a plainly disproportionate burden on MNOs by requiring provision of a bundle of wholesale and retail services in return for a charge which is designed to cover recovery of only wholesale costs. Moreover, the relevant service is wholesale roaming resale access. The interpretation of this concept cannot reasonably be stretched to cover services which are neither wholesale services nor related to the resale of the wholesale roaming service which the MNO has itself purchased.

BEREC considers therefore that the bundle of services covered by the price caps comprises only those services which are wholesale in nature and are closely related to the wholesale roaming service purchased by the MNO.

Nevertheless, that leaves a number of services which many resellers will require in practice as it would either be impractical or uneconomic for them to self-provide. If such services were to be provided only at the discretion of MNOs, there would be a risk that a number of potential resellers would be in practice unable to offer roaming services and, in particular,

that some existing providers would have to withdraw their services. This is plainly contrary to the purpose of the Regulation.

BEREC considers therefore that there is another category of mandatory resale access services – those which resellers commonly need to purchase from MNOs, for reasons of practicality or economy. These include a range of disparate services including termination of roaming SMS (wholesale, but not generally included in the price of wholesale roaming), of incoming calls and control of pre-pay credit and data bill shock (retail but beyond the capacity of many resellers to provide). These may be charged at fair and reasonable prices. While BEREC recognises that the Regulation does not set out an explicit obligation to offer such services, it considers that failure to do so would amount to constructive refusal to supply the mandatory services explicitly required by Art 3.

Q2. Do stakeholders agree with BEREC's approach to mandatory and optional resale access services and to its approach to pricing?

4. IDENTITY OF ACCESS SEEKERS (Guideline 4)

The rights of undertakings to access defined in Article 3 apply, according to the definition of “roaming access”:

“for the purpose of that other undertaking providing regulated roaming services to roaming customers”

It is also apparent from the definitions that “roaming customers” are end users rather than retailers of roaming services.

BEREC has been asked to consider whether operators of hub aggregation services are entitled to benefit from the right to request direct access on regulated terms. On the basis of a literal reading of the definitions, the right for direct wholesale roaming access on regulated terms only applies for the purpose of supplying retail customers and would generally exclude hub aggregators.

However, hub aggregators might still be entitled to direct access on regulated terms in order to serve their customers which are EEA providers of regulated retail roaming services.

Recital 27 of the Regulation refers to the need for MNOs to allow MVNOs and resellers to benefit from hub aggregators' offers:

“The wholesale roaming access obligation should also cover mobile network operator’s obligation to enable mobile virtual network operators and resellers to purchase regulated wholesale roaming services from wholesale aggregators which provide a single point of access and a standardized platform to roaming agreements all over the EU.”

BEREC considers that failure to meet a reasonable request for access from a hub aggregator on regulated terms could, depending on the purpose for which access was sought, amount to constructive refusal to comply with the obligation above. On that basis, the right of access would extend to hub aggregators enabling providers to offer regulated retail roaming services, whether or not they are associated with a mobile network.

Q3. How would your business be affected if the right for direct wholesale roaming access applies to hub aggregators for the purpose of supply of regulated roaming services to EEA customers? How could a distinction between access for such purposes and access for purposes unconnected with the Roaming Regulation be applied in practice?+

5. REFUSAL OF REQUESTS (Guideline 5)

BEREC is concerned about the potential for reasonable requests for access to be refused on spurious grounds, either as a delaying tactic or in an attempt to reduce ongoing competition. It has attempted through its drafting to minimise the scope for use of such tactics. It would particularly welcome advice on how this risk could be reduced further.

Q4. Do you agree with BEREC's general approach to refusal of requests? Do you have any specific suggestions on how the guidance in this area could be strengthened so as to deter refusals on spurious grounds while not constraining the right of MNOs to refuse to provide on the basis of careful objective justification?

6. RESALE ACCESS SERVICES PROVIDED TO UNDERTAKINGS WHOSE RETAIL SERVICES ARE OTHERWISE HOSTED ON OTHER NETWORKS (Guideline 6)

Normally, it would be expected that resellers would be hosted by the network operator providing wholesale roaming resale access. However, the Regulation opens the possibility that other MNOs, MVNOs and resellers hosted on other networks might seek such access. Except in the context of decoupling under Articles 4 and 5 of the Regulation (which is expected to be covered by further BEREC guidance to be developed), BEREC does not expect that there will be any material demand for resale access from market players whose retail services are hosted on other networks. While it does not wish to rule out this possibility, it has not yet deployed any effort to work out relevant Guidelines.

Q5. Do stakeholders consider that further Guidelines should be developed to deal with the issue of requests for wholesale resale roaming access from market players whose retail services are otherwise hosted on other networks? If so, please provide examples of commercially credible retail services which could be operated in this manner.

7. Resale of unregulated roaming services (Guideline 13)

Where MNOs provide resale access, the Regulation does not explicitly require them to provide access for the purposes of retail provision of unregulated services (in particular roaming voice calls and SMS messages where either sender or recipient is outside the

EEA). However, BEREC considers that the great majority of customers would find it confusing and inconvenient to have one retail supplier of intra-EU roaming services and another supplier of extra-EEA services. For that reason, BEREC takes the view that access must, where practical, include resale of extra-EEA roaming services and that refusal to supply such access would amount to constructive refusal to provide regulated access. Fair and reasonable charges may be levied for such access.

Q6. Do you agree with BEREC's views on resale access to unregulated services?

8. Fair and reasonable charges (Guidelines 19 & 20)

BEREC does not propose to lay down detailed guidance covering the meaning of fair and reasonable charges in most cases as this risks being over-prescriptive. Instead, it proposes to lay down various general principles which it believes should be sufficient to allow parties negotiating in good faith to reach a reasonable agreement. Stakeholders are reminded that if a dispute is submitted to an NRA for resolution, there is no guarantee that the NRA will make a decision as favourable to them as could have been achieved through commercial negotiation. BEREC is happy to consider other general principles to complement those which it has already identified in the draft Guidelines.

Q7. Do you agree with BEREC's general approach to fair and reasonable prices? Do you consider that other general principles should be articulated?

However, BEREC believes it would be useful to lay down more detailed guidance in small number of situations where there may be different views on the appropriate basis. In the case of resale of incoming roaming voice calls, BEREC notes that the MNO is liable to the visited network for a termination charge and also bears the costs of termination and re-originating the call on its own network (including the cost of transit). There is no corresponding regulated wholesale roaming service and, therefore, fair and reasonable charges apply. BEREC considers that the appropriate approach is for fair and reasonable charges to be sufficient to neutralise the costs borne by the MNO.

Q8. Do you agree with BEREC's proposed basis of charging for resale of incoming roaming voice calls?

The case of roaming SMS is similar but more complex. The regulated wholesale service does not usually cover the cost of terminating an outgoing SMS and the MNO is therefore liable for charges which it is unable to recover through the regulated charge for wholesale resale access. On the other hand, it can offset this loss, in whole or in part, through the charges it levies for the termination of incoming SMS which normally greatly exceed the cost of termination. As for incoming voice calls, there are in addition some costs associated with the need to re-transmit incoming messages to the visited network (which in this case does not normally levy a termination charge).

Commercial practice is that consumers are not charged for incoming SMS. Instead the MNO costs associated with such services are aggregated with those of corresponding outgoing SMS and recovered only through the charges for outgoing SMS. This practice appears to have arisen at least in part because numbers of incoming and outgoing messages are expected to be roughly in balance. An outgoing message tends to stimulate an incoming message in response; and vice versa.

Therefore BEREC considers that any fair and reasonable charge for resale of the service of terminating outgoing roaming SMS must take into account the offsetting income from incoming SMS. Very often, these amounts will net off to an aggregate close to zero as many MNOs charge the same “standard” rate for termination of international SMS. Where the MNO’s charges for termination exceed the charges it pays, no resale termination charge will generally be justifiable.

Any MNO which proposes to levy an SMS termination charge on its reseller should be prepared to provide objective justification on request concerning the necessity of such a charge to avoid providing services at a loss and the reasonableness of the level. Exceptionally, where an MNO charges (for example, as a consequence of national regulation) termination rates materially lower than the “standard” rate, it may be entitled to levy higher resale charges in order to neutralise the difference. On this basis, charges for resale of outgoing SMS should cover any costs of the MNO in providing resale of both outgoing and incoming roaming SMS. No resale charge for incoming SMS is therefore justifiable.

Q9. Do you agree with BEREC’s proposed basis for resale charges for termination of outgoing SMS?

9. Service level agreements and guarantees (Guideline 23)

BEREC considers that it is good commercial practice to include a service level agreement (SLA) in the contractual arrangements between parties so as to incentivise the provider to deliver a reasonable level of service. In its recent work on Common Positions on SMP Remedies, BEREC has taken the view that service level agreements and guarantees should be a standard component on SMP remedies. The SLA should describe explicitly the minimum level of service which is expected to be delivered for key components of the service. Automatic compensation payments should be triggered by failure to deliver those levels of service.

BEREC has therefore proposed in its draft Guidelines a set of topics to be covered by SLAs and corresponding compensation payments. This does not preclude the addition of other items in particular cases. BEREC welcomes comments on whether the topics covered in its Guidelines are sufficiently comprehensive and on whether further detail could usefully be added.

The Guidelines also provide for a reporting regime on service levels actually achieved in order to allow tests of the overall quality of the service provided and whether or not the access seekers receive the same level of service in response to problems as is delivered when analogous problems arise for the MNO’s own retail customers. Such reporting should be in sufficient detail to deliver useful monitoring results but not so detailed as to cause the generation of over-frequent reports or reports of limited practical value. BEREC welcomes comments on whether the Guidelines strike the correct balance.

Q10. Do you have any comments on BEREC’s approach to service level agreements and guarantees or on the regular monitoring of service levels?

10. Interoperability, interfaces and protocols (Guideline 25)

BEREC believes that the right approach is to use accepted standards and methods as far as possible. It would welcome views on what the relevant “accepted standards and methods” are, to test whether or not there is general consensus.

It accepts that this approach cannot be followed universally. It welcomes comments on whether it can usefully take action, beyond articulation of this general approach, to promote such standardisation, recognising that BEREC is not a standardisation body and that discussions aimed at standardisation are primarily for the market players themselves.

Q11. Please set out your views on what the “accepted standards and methods are. Is there any action which BEREC could usefully take to promote further useful standardisation?

11. Fraud prevention (Guideline 30)

The Guidelines include a few general considerations about fraud prevention but nothing explicit. BEREC recognises that international roaming provides opportunities for fraud and that the issue can be a sensitive one for market players. It would welcome views as to whether the Guidelines should include explicit provisions on the issue.

Q12. Do you consider that the Guidelines should include specific provisions on fraud prevention in addition to the generic statements in the draft?

12. Restrictions on conduct of business (Guideline 32)

As a general principle, access seekers should not be hindered from conducting their business as they see fit, within the constraints of the law. Moreover, they should not be required to discuss their plans with the access provider, except insofar as this is necessary to allow the access provider to deliver service efficiently. The draft Guidelines already take this approach. BEREC would not favour setting out an exclusive list of restrictions which would be considered to be inadmissible. Nevertheless, it would be open to inclusion of an indicative list if stakeholders believe that this would be useful.

It is however legitimate for access providers to expect “fair use” from their wholesale customers. In order to deliver service efficiently, access providers are entitled to request information on expected volumes or, in the absence of such information, impose maxima for volumes or intensity of utilisation.

Q13. Do you consider that BEREC should provide more detailed guidance on restrictions of conduct of business? In particular, would it be useful to include an indicative list of generally unacceptable restrictions in the Guidelines.

In particular, the main goal of the roaming Regulation is to enable European customers to keep on using their mobile phones when travelling to a different Member state, i.e. for “temporary roaming”. Nevertheless, in some instances, providers may seek access or use granted access for applications which could be considered to be “permanent roaming” uses in the visited Member state. . One practical example might be in order to commercialise retail services to international companies which have a part of their staff permanently based

in the visited Member state. Machine to machine applications embedded in equipment manufactured or distributed from a central point and designed to be portable or transportable might also give rise to “permanent roaming” if the equipment is never in practice transported outside the home country.

Some stakeholders argue that use of roaming access as a substitute for domestic MVNO contracts to sell services in the home country was not covered by the general objectives of the regulation and might in practice give rise to problems of network congestion and disruption. On the other hand, other stakeholders argue that the obligation set out in article 3 is not explicitly limited in that sense. Moreover, the above examples show that there is a considerable grey area between temporary and permanent roaming which it could well be impractical to try to categorise. In the meantime, it seems very unlikely that using roaming access as a substitute for domestic contracts would be an attractive commercial strategy to gain entry to a market for the purpose of mass market competition in everyday national mobile services.

BEREC has consequently not seen the need to develop Guidelines on the issue of permanent roaming. Stakeholder views would nevertheless be welcome.

Q14. Do you consider that any current practical “permanent roaming” applications should be considered as an “unfair use” of roaming wholesale access agreements? If so, please explain why and also how you would propose to distinguish between “fair” and “unfair” uses of permanent roaming. Would a distinction based on the phone number of the roaming MSISDN be relevant and applicable?

13. Unreasonable barriers to entry (Guideline 33)

BEREC considers that it is common commercial practice for providers of services to take certain safeguards to ensure that they will be recompensed in practice for the services they provide and/or investments they undertake on the purchaser's behalf. For example, a supplier might ask for a bank guarantee that funds will be available to meet expected invoices. In principle, that is acceptable. However, suppliers cannot expect to operate without commercial risk and it would be unacceptable if such “safeguards” had the effect of preventing a typical access seeker from entering the market. Any such safeguards must therefore be pitched at an appropriate level.

A number of other artificial barriers to entry, all unreasonable, can be imagined. For example a supplier might seek to impose minimum guaranteed purchase volumes, bundling of services or exclusivity clauses. While the draft Guidelines contain a general presumption against anti-competitive clauses, BEREC would welcome comments on whether it would be useful to include an indicative list of such provisions which were generally considered to be unacceptable.

Q15. Do you consider that the Guidelines need further detail concerning anti-competitive provisions which must not be included in the Reference Offer or supply contract?

14. Other issues

As noted above, BEREC has concentrated in this consultation paper on the access issues it believes are most likely to be problematic. It is open to all other comments concerning its Guidelines.

The current draft has benefited from informal contact with a number of stakeholders. Nevertheless, BEREC recognises that some stakeholders may feel the need for guidance on issues which have not so far featured strongly in informal discussions. BEREC would particularly welcome reasoned arguments on any such issues or on issues where stakeholders believe that BEREC's draft guidance needs further development.

Q16. Do you consider that the Guidelines should cover additional issues or that the draft guidance on issues already covered should be further developed?

Q17. Do you have any other comments on the draft Guidelines?

ANNEX – DRAFT GUIDELINES FOR CONSULTATION

1. Introduction

According to Article 3 of the Regulation, mobile network operators (MNOs) must meet all reasonable requests for wholesale roaming access, comprising direct wholesale roaming access and wholesale roaming resale access. Direct access means that the retail provider contracts directly with a foreign EU/EEA visited network for the purpose of allowing roaming customers to access the roaming services of the retail provider. It is worth noting that “direct” access is not necessarily physical. The concept also includes the possibility of a direct charging agreement between retailer and visited network operator, in conjunction with physical access negotiated with a host MNO. Resale access means that the retail provider bases its retail service on the wholesale service provided by an MNO usually, but not necessarily, in the end user’s home country.

While Article 3 is drafted in general terms, it is expected that most direct access agreements will be broadly in line with the classical wholesale roaming agreements negotiated between MNOs. The existing access agreements between MNOs, on the one hand, and MVNOs/resellers, on the other hand, are (to the extent that they deal with roaming) generally domestic commercially agreed resale agreements. As from 1 July 2012, the roaming aspects of these agreements fall within the scope of Article 3. Moreover, requests for other variants of direct or resale access must be met, provided only that they are reasonable, irrespective of whether the access seeker is an MNO, MVNO or reseller without systems.

This document contains the guidance which BEREC is required under the Regulation to publish relating to the operation of Article 3 in practice. It describes the main obligations for MNOs (and corresponding rights of access seekers) concerning the provision of roaming access services. The guidance is not legally binding. Nevertheless, NRAs are required to take the utmost account of it in resolving any disputes or taking any enforcement action concerning Article 3. In particular, where NRAs make a decision which departs from this guidance, they will be expected to state objective reasons for the departure.

The Guidelines apply to “regulated” roaming services, as defined in the Regulation. Except where the Regulation explicitly applies to other services, it means services where the roaming customer³ is roaming within the EEA⁴.

BEREC expects that these Guidelines will be a living document and will be updated from time to time in the light of experience.

³ A ‘roaming customer’ is “a customer of a roaming provider of regulated roaming services, by means of a terrestrial public mobile communications network situated in the Union, whose contract or arrangement with his roaming provider permits Union-wide roaming”.

⁴ The Regulation applies immediately to EU member states. It is expected to be extended shortly to the other states of the European Economic Area (EEA). Until such time as those states (Iceland, Liechtenstein and Norway) have incorporated the Regulation into national law, rights and obligations described by these Guidelines do not apply to market players based in those states.

2. Entry into force

Guideline 1

As from 1 January 2013, MNOs must offer services on the basis of a Reference Offer based on these Guidelines. The basic obligation to meet reasonable requests for access nevertheless applies from the date of entry into force of the Regulation, expected to be 1 July 2012. It would be a *prima facie* breach of the Regulation to delay dealing with requests for access until the Reference Offer is published.

Existing access agreements, to the extent that they deal with regulated roaming services, may need to be updated from 1 July 2012 to make them consistent with the Regulation.

3. Types of access service offered

Guideline 2

MNOs must be prepared to offer both direct and resale access, irrespective of whether they currently offer such services.

In the case of resale access, they will offer:

- (a) The minimum set of wholesale resale services required to allow a retail provider with its own systems for handling all retail functions to provide a retail roaming service of satisfactory quality
- (b) Other wholesale services without which a retail roaming service would not be practical
- (c) Retail functions which are commonly required by resellers

In addition, they may offer:

- (d) Any other services, at their own discretion.

The price for the bundle of services under (a) must not exceed the limits set out in Articles 7, 9 and 12 of the Regulation, subject (where appropriate) to the currency exchange rules in Article 1.

The price for services offered under (b), (c) or (d) shall be fair and reasonable.

An illustrative example of the distinction between categories (a) and (c) may be useful. Issuing of bills to end-users is a retail function. If the retailer decides to request the access provider to issue retail bills on its behalf, it should expect to pay fair and reasonable charges. On the other hand, the retailer should be entitled to issue its own bills if it prefers. For this, it requires in particular a flow of electronic information detailing customer usage which can be fed to its own retail billing systems. This last service would form part of the minimum set of resale services required to be offered at a charge not exceeding the price cap.

4. Granting or refusal of request

Reasonable requests

Guideline 3

Article 3 of the Regulation requires MNOs to grant all reasonable requests for access which may be necessary to allow the access seeker to provide a roaming service (and relevant ancillary services) of reasonable quality and specification. In judging reasonable quality and specification, NRAs will have regard to the nature of the roaming service provided by the MNO in question and by other roaming service providers with their own networks more generally.

Whether or not a request is reasonable will always be judged on the merits of the case. But as a general rule, BEREC expects that any request which does not require deployment of an undue level of resources to implement it and where it is reasonable to foresee that the implementation costs will be recovered within a reasonable period would be regarded as reasonable.

Requests for access to provide services which are not regulated roaming services are not covered by the Art 3 obligation or by these Guidelines. Except where there is national regulation of such access in individual Member States, any such requests fall to be negotiated on commercial terms.

Identity of access seekers

Guideline 4

Any undertaking which is entitled, under the law of the Member State in question, to provide roaming services to roaming customers in that Member State enjoys the right to wholesale roaming access under the terms of Article 3. BEREC takes the view that a ‘roaming customer’ is identified by EU numbering resources assigned to the mobile service.

BEREC considers that the right to request direct access on regulated terms extends to operators of hub aggregation services when providing regulated roaming access, to the extent necessary for the hubs to serve EEA providers of regulated retail roaming services, notwithstanding that the hubs may have no retail customers of their own.

Refusal of requests

Guideline 5

Requests for access may not be refused except for objectively justified reasons, backed up by evidence where appropriate. The MNO may not, during consideration of the request, seek information on the commercial nature of the services which the access seeker plans to offer. Refusal on the basis of an unfounded suspicion of a particular behaviour or outcome is not justifiable. Full reasoning for any refusal must be provided in writing to the access seeker.

Neither explicit nor constructive refusal on the basis that access would be available from another provider is justifiable.

Guideline 6

Requests for resale access may not be refused on the basis that the access seeker is not currently hosted on the MNO network (either for resale of domestic or roaming services)

Prioritisation of requests

Guideline 7

It is understood that prioritisation of requests may be necessary. Nevertheless, requests must be dealt with according to a non-discriminatory process. The commercial interests of the access provider should not be a relevant consideration in deciding on prioritisation.

Guideline 8

Without prejudice to the generality of Guideline 5, BEREC does not envisage that any in the following indicative list would constitute legitimate reasons for refusal of a request:

- network or signalling saturation
- network planning or releases
- limitations in billing or “back office” systems
- the necessity to make investments to support access, unless it is reasonable to foresee that the investment costs cannot be recovered in a reasonable period
- size of the access seeker or of its customer base
- existence of equivalent roaming offers or supply in the same Member State where roaming is requested

5. Information required from access seeker

Guideline 9

MNO's must inform access seeker promptly and in a timely manner on the information needed to make an adequate specified access request (including necessary facilities). Information required by access providers shall be limited to the minimum necessary to allow them to provide an efficient access service, together with any evidence which may be necessary under the relevant national law to establish that the access seeker is entitled to seek access under Article 3. Information may be required at the outset of discussions about access. Further information may be required throughout the life of the access agreement.

Information required before signature of an access agreement

Guideline 10

BEREC expects that non-technical information will be limited to that which commercial parties would normally seek from one another at the outset of any agreement. Access seekers should in particular not be expected to provide any details of the service they expect to provide where these might reasonably be regarded as commercially sensitive.

Required technical information for resale of roaming and direct access services must be limited to technical information on for example used interfaces and protocols by access seeker which is needed to assess compatibility with the services offered by access provider. Any technical information that is not needed to assess compatibility with the requested services by access seeker is not required in advance of negotiations.

In case of direct access for roaming services additionally it might be required to give an initial estimate of traffic volumes to asses needed connection capacities. Not meeting up to given estimates should not lead to penalties in any form like for instance downgrading services or negatively changing agreed terms.

An efficient method of establishing communication between the parties so that access requests can be processed and implemented without delay should be established at the outset.

Information required on an ongoing basis

Guideline 11

The access provider may lay down a reasonable procedure for the regular supply and updating of forecasts by the access seeker of its future demand (including, where appropriate, the geographical nature of that demand), where this is necessary to allow the access provider to dimension its service efficiently or to provide the necessary resources. The degree of foresight or precision required should not be excessive. It should be understood and accepted that demand is inherently uncertain and will depend in particular on the commercial success of the access seeker's retail service.

6. The minimum set of wholesale access services offered in respect of regulated roaming services

Direct access

Guideline 12

MNOs must offer all services which have typically been offered under wholesale roaming agreements in the period before the current Regulation came into effect. This does not preclude requests from a wider range of access seekers than in the past nor for a wider range of access services.

Resale access

Guideline 13

MNOs shall provide access to all the wholesale roaming services they purchase from visited network operators, including all information about usage by the roaming customer. This shall be sufficient to allow the access seeker to offer both prepaid and postpaid services.

Where a new wholesale roaming agreement is negotiated, existing access agreements will automatically be extended to cover access to the new visited network. Similarly, if a wholesale roaming agreement is varied or terminated, the relevant changes shall apply automatically to existing access agreements.

Guideline 14

Without prejudice to the general nature of the obligation, MNOs shall offer services in the following indicative list:

- a) open access to technical interfaces, protocols or other core technologies which are required for the interoperability of the services necessary for a reseller to carry out for itself necessary retail functions (in particular, billing, control of pre-pay credit, control of bill-shock, transparency obligations)
- b) access to operational support systems or equal software systems which are necessary to implement resale of roaming services.

Guideline 15

Charges for services provided under this section shall be limited by the caps defined in Articles 7, 9 and 12 of the Regulation, subject to the currency exchange rules in Article 1.

7. Other wholesale access services

Unregulated roaming services

Guideline 16

Section 7 shall also apply to unregulated roaming services (e.g. roaming calls to and/or from a state outside the EEA), with the sole exception that charges are not covered by price caps and should be fair and reasonable.

Termination of incoming calls and outgoing SMS

Guideline 17

The wholesale roaming charge does not normally include the costs for termination of outgoing roaming SMS or incoming roaming voice calls. Therefore these termination services cannot be considered to form part of a wholesale roaming **resale** service. These services must nevertheless be offered to resellers of wholesale roaming access under the terms of Guideline 2 (indent (b)). Fair and reasonable prices may be charged.

8. Retail services commonly provided to resellers

Guideline 18

MNOs shall offer all services commonly provided to resellers of roaming services. Without prejudice to the generality of this requirement, this shall include:

- (a) Billing of post-pay services
- (b) Credit control for pre-pay services
- (c) Control of data bill shock
- (d) Services to implement retail transparency obligations

The provision of any of these services may not be offered subject to a restriction that other services shall be taken in addition. Prices for such services shall be fair and reasonable in accordance with Section 7.

9. Fair and reasonable prices

Guideline 19

Where these Guidelines specify “fair and reasonable” prices, compliance with this requirement will often necessitate consideration of the individual circumstances of the case. In dealing with any complaint about no-compliance or dispute, NRAs will in particular take into account the following considerations:

- whether there is a “market rate” for such services (or broadly comparable services). Any charge significantly in excess of the market rate is unlikely to be reasonable
- the cost of provision and the magnitude of the resulting return to the MNO. Such returns should not be excessive
- the need to minimise the overall cost of resale access, in order to facilitate the objectives of the Regulation to promote retail competition, including via resale.

Fair and reasonable charges for resale of termination of incoming calls and outgoing SMS

Guideline 20

A fair and reasonable charge for termination of incoming calls may be levied to recover the costs to the MNO arising from termination of calls received by customers of the reseller.

A fair and reasonable charge for termination of outgoing roaming SMS shall take account of income received by the MNO for termination of incoming roaming SMS received by customers of the reseller.

Objective justification of the basis of the charge must be made available to the access seeker on request concerning the necessity of such a charge to avoid providing services at a loss and the reasonableness of the level.

BEREC expects that a fair and reasonable charge will not exceed €0.5c per outgoing SMS, except where the MNO can demonstrate that, for roaming SMS sent and received by customers of the access seeker, the average termination charge paid per outgoing SMS significantly exceeds the average termination charge levied for incoming SMS.

Where the average termination charge paid per outgoing SMS is significantly less than the average termination charge levied on incoming SMS, a charge to resellers is unlikely to be justifiable.

There should be no charge for termination of incoming SMS to resellers having resale access.

10. Non-discrimination

Guideline 21

Where services are required to be offered in accordance with these Guidelines, all terms and conditions of supply (except price) must be equivalent to those relevant for the provision of services to the MNO itself.

Without prejudice to the generality of this requirement, it applies in particular to:

- a) the availability of access services and necessary facilities;
- b) maintenance periods;
- c) repair times in case of malfunctions;
- d) process of ordering and delivery;
- e) process of announcing new or redefined access services;
- f) process of supply of information.

11. General requirements for Reference offer

Guideline 22

BEREC expects that most access will in practice be granted in line with the access provider's standard Reference Offer which is required to be published not later than 1 January 2013. This should cover all the aspects described below in sufficient detail for access seekers to understand the nature of the service offered. The Reference Offer will also include any additional services which the access seeker wishes to provide to any requesting party, over and above those which are regarded as necessary.

The terms and conditions of the Reference Offer shall be constructed in accordance with these Guidelines and any relevant regulatory requirements. To the extent that this would not be in conflict with these Guidelines or relevant regulatory requirements, the Reference Offer shall also be constructed in accordance with normal commercial practice.

The Reference Offer shall be sufficient to allow any access seeker to replicate the retail service of the access provider.

The maximum charge for each service offered shall be stated explicitly. Lower charges and/or discounts (calculated on the basis of volume or other factors) may be negotiated individually.

Charges shall not be levied as a consequence of failure to meet a volume forecast submitted for planning purposes or failure by the access seeker to take some action within the timescale requested.

The Reference Offer shall be prepared and finalised in accordance with standard national procedures for the preparation of reference offers under the European Regulatory Framework. BEREC expects that in all cases the views of access seekers will be sought and taken into account during the formulation of the Offer.

The Reference Offer shall be published on the MNO's web-site in such a way that it will be easily accessible. Planned modifications shall be notified by a secure means to undertakings which have current access agreements or are in active negotiation for such agreements.

The access provider may also be prepared to negotiate bespoke agreements with individual access seekers. These are not required to be covered by the Reference Offer.

12. Specific requirements of the Reference Offer

Agreement on performance

Guideline 23

The Reference Offer shall incorporate a Service Level Agreement which sets out clearly the standards of service which the access seeker can expect. The Agreement shall incorporate Service Level Guarantees, with appropriate compensation in the event of failure to meet those guarantees, on all aspects of performance which are critical to the provision of the access seeker's own retail service. In particular, BEREC considers that minimum service levels should generally be specified for ordering, delivery, normal operation, maintenance and repairs. The specified minimum service levels should be at least as good as those normally achieved by the MNO in respect of services provided to itself and should, in addition, be consistent with best industry practice.

Compensation for failure to meet agreed minimum service levels should be appropriate to incentivise achievement of those levels and should not be less favourable than in the case of normal commercial practice.

MNO must supply without delay a regular detailed quality report to the access seeker, capable of demonstrating whether or not the specified quality parameters have been met and the extent of any non-conformity. The report shall show the quality levels achieved in respect of services provided to each of the following:

- The access seeker in question
- All access seekers in aggregate
- The MNO itself

Procedures shall be established for the automatic payment of any compensation due at the same time as the production of the Report.

Interconnection

Guideline 24

If applicable, as for instance for direct access or real time connections in case of resale, the MNO must implement procedures for traffic and network management for ensuring the orderly transport of traffic in case of malfunction or overflow. Suitable procedures may include alternative traffic routes to repair access service during malfunctioning or overflow.

Interoperability, interfaces and protocols

Guideline 25

As far as possible, MNOs must use acknowledged technical standards and methods. Where there is no such standard or method, MNOs must avoid approaches which are unduly burdensome for the access seeker.

Implementation of CAMEL protocol for direct access

Guideline 26

The reference offer will include as a minimum access to CAMEL (Customised Applications for Mobile networks Enhanced Logic) phase I functionalities allowing access seekers a basic call management of prepaid calls.

Guideline 27

When the operator has at its own disposal more advanced phases of CAMEL (or DIAMETER), the reference offer will include the use of these functionalities as an optional feature.

Testing procedures

Guideline 28

The Reference Offer must describe transparent and flexible procedures for testing, in particular of interconnection, interoperability, forecasting, ordering and delivering services. Timescales must be consistent with the maximum permitted implementation period.

Security and data privacy

Guideline 29

The Reference Offer may set out reasonable provisions on these issues consistent with the requirements of the European Regulatory Framework.

The parties are subject to terms of protection of personal data to the applicable legal provisions. For that it is necessary that both parties commit themselves to observe the secrecy rules and maintain the data secrecy according to the applicable law.

Each party's obligations shall be discussed and agreed on and documented in the contract. These obligations shall be within the regulations and laws of the respective countries.

Fraud prevention procedure

Guideline 30

Procedures to prevent fraud may be imposed to the extent necessary to comply with legal obligations or in accordance with normal commercial practice.

Both parties shall lay down and agree on fraud prevention procedures concerning fraudulent or unauthorized use by Roaming Customers to comply with legal obligations.

Contract duration including any break clauses

Guideline 31

The duration of the contract may be set to suit both parties. However, neither party is entitled to insist (or to specify terms which have the same practical effect as insistence) on a contract which is either unduly short or long. BEREC expects that most contracts will be negotiated (or reviewed, with the possibility by the access seeker to break) on an annual basis.

An MNO is not allowed to cease an already allowed access service without objective justification, in which case an appropriate period of notice must be given. In resolving any dispute on cessation of service, an NRA shall take into account all relevant factors, including the following:

- The reasonableness of period of notice, taking into account the reasons for cessation
- The availability of suitable alternatives
- The equivalence of treatment with that relevant to the MNO's own services
- The appropriateness of any migration procedure offered.

Restrictions on conduct of business

Guideline 32

The contract shall not impose any restrictions on the access seeker except those which are fully described in the Reference Offer, those which are required by law or those which would be regarded as normal commercial practice. Restrictions on the freedom of the access seeker to conduct its business as it sees fit in accordance with the law shall generally be inadmissible. Technical restrictions may be imposed only where there is objective justification for the restriction. Where the access seeker imposes restrictions, it shall readily provide objective justification on request.

Supply conditions which deter entry

Guideline 33

Access providers may impose safeguards to assure payment for services provided or to assure recovery of investments undertaken specifically to provide access. Any such safeguards must be proportionate, such as would be standard commercial practice between willing buyer and willing seller and should be discontinued when they are no longer necessary. They should not have the effect of imposing insuperable barriers to entry especially for small players.

Contractual requirements which seek to impose exclusivity clauses or bundling of services or other requirements which have anti-competitive effect are unacceptable unless there is exceptional justification.

Management and implementation of new roaming agreements

Guideline 34

The contract shall be concluded in written agreement and include terms and conditions and all needed specifications to enable both parties to fulfil their rights and obligations in

compliance with law. Any changes, amendments and/ or additions that arise during time shall be agreed on and documented.

The specifications shall include all processes, e.g. installation, configuration, running, testing and making necessary changes to ensure the implementation of direct wholesale roaming access or wholesale roaming resale access compliant to Art. 3.

In case of any update or new roaming agreement available the alternative roaming provider shall be informed by the MNO without undue delay. Both parties shall evaluate the impact of any such change for their customers and shall agree on the necessary actions to be performed.

Update of Reference Offer

Guideline 35

The Reference Offer will need to be updated at least every year in order to update regulated prices. Apart from that, it should be updated as soon as possible:

- (1) In order to be compliant with a decision of the NRA or with an update of the BEREC Guidelines; or
- (2) When the existing Reference Offer no longer properly or fully describes the services on offer

The Reference Offer must describe a reasonable procedure for the processing of requests for new methods of roaming access (including necessary facilities) and the resulting modification of the Reference Offer.

Timing issues

Guideline 36

The time limits set out in the Regulation should be regarded as maxima. Notwithstanding the time limits, access providers should make reasonable efforts to respond as soon as possible. Where the access provider requires information from the access seeker in order to proceed and there is a delay in provision, the period of any such delay shall not count towards any relevant time limit.

Responses to requests for access

Guideline 37

MNO must process an initial request for wholesale roaming access (including necessary facilities) in a timely fashion (2 weeks should be sufficient, barring exceptional circumstances) and professional manner (i.e. acknowledging acceptance of request, requesting missing info and specifying the missing info). If necessary or requested the MNO must grant the possibility to orally discuss the access request with the access seeker.

New and modified services

Guideline 38

New or modified services shall not be offered (or provided to the MNO itself) until at least two months after formal modification of the Reference Offer. The period may be shortened if all undertakings to which the relevant access is provided agree.

*Negotiation time***Guideline 39**

A draft contract should be made available to the access seeker for signature within one month of the access request. The draft shall remain open for signature until such time as the Reference Offer is amended.

*Implementation time***Guideline 40**

An access agreement should be implemented as soon as possible but in any case within 3 months of contract signature, subject to any delays on the part of the access seeker.

*Dispute resolution***Guideline 41**

In accordance with the Article 17 of the Roaming Regulation III in the event of a dispute between undertakings providing electronic communications networks or roaming services in a Member State, the dispute resolution procedures laid down in Articles 20 and 21 of the Framework Directive should be applied.

In the event of a dispute between a roaming subscriber and his retail provider which is a reseller concerning an issue falling within the scope of the Regulation, MNOs should provide any co-operation which the reseller may reasonably require, including in respect of out-of-court dispute resolution procedures laid down in Article 34 of the Universal Service Directive.